IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,
Appellant

versus

W.P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,
Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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INTRODUCTION

This is an appeal from a final judgment of the Supreme Court of Appeals of West Virginia filed on December 18, 1975. The appellant submits this jurisdictional statement to show that this Court has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion below by the Honorable Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion is set out in full in Appendix A.

The judgment of June 19, 1972, by the Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia, incorporated Judge Taylor's letter memorandum of opinion of April 17, 1972. A copy of that judgment and opinion is set out in full in Appendix B.

JURISDICTION

The suit is one to set aside as a cloud upon the title to an oil and gas interest a purported conveyance of such interest by a tax deed under a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 *U.S.C.* § 1257 (2) or, in the alternative, § 1257 (3).

STATUTES INVOLVED

The case involves the validity of West Virginia Code 1931, §§ 11A-4-12 and 11A-3-8. These statutes are set out in Appendix C.

QUESTIONS PRESENTED

The questions presented by this appeal are:

(a) whether under the requirements of due process of law embodied in the fourteenth amendment to the United States Constitution a state statute may permit, solely by a publication naming the person as an unknown defendant, notice of a tax sale of the

property interest of a person whose name and address is known or very easily ascertainable; and

(b) if such notice is constitutionally deficient, whether a state, consistent with due process, may invoke a statute of limitations to bar such person from attacking the validity of the sale.

STATEMENT OF THE CASE

By a deed from her son, H.C. Pearson, Jr., executed and recorded in 1937, the appellant, Cecle G. Pearson, acquired a full one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia. Although the appellant did not change the entry in the land books from her son's name to her own, appellant's husband paid the real estate taxes on her interest from the time of the first assessment in 1938 until 1960. Through an oversight, no taxes were paid on appellant's interest in 1961. As a result of this nonpayment, the assessment on appellant's interest was declared delinquent in 1962.

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County instituted a suit in the name of the State of West Virginia for the sale of this and other delinquent interests in real property. On April 26 of that year, the Deputy Commissioner purported to convey by a tax deed to appellee W.P. Dodd "68 Acres, 1/8 Acre Oil and Gas Interest . . . being the same property conveyed to H.C. Pearson, Jr. . . ." In 1967, Mr. Dodd and his wife ratified an existing lease upon the sixty-eight acres executed in favor of the United Fuel Gas Company and granted United the right to drill a natural gas well. This well was completed in 1968 and produced an initial open flow of one hundred million cubic feet of gas. Under the terms of the lease, the lessors were each entitled to "their proportionate part of one-eighth of the wholesale market value" of the gas produced.

On July 26, 1968, Mrs. Pearson paid the State Auditor $101.86 and received a Certificate of Redemption of Lands in her name for "68A, 1/4 O & G Interest" in the property in question. She subsequently filed this suit against the Dodds and United Fuel. By an order of the Circuit Court dated July 9, 1971, appellee Columbia Gas Transmission Corporation was substituted as a defendant for United Fuel.

West Virginia Code § 11A-4-12 permits the sale of delinquent property interests upon notice by publication upon "unknown parties who are or may be interested in any of the lands included. . . ." The only notice of the sale in question was given by publication in two local newspapers on April 16 and April 23, 1966. This notice mis-described the interest as "68 Acres, 1/8 Acre Oil and Gas Interest" and listed the former owner as H.C. Pearson, Jr.

The Circuit Court granted judgment for the defendants-appellees. In its letter memorandum of opinion, it held, *inter alia,* that the notice provisions of § 11A-4-12 did not deny the plaintiff-appellant due process of law under the United States Constitution. In affirming the judgment of the Circuit Court, the Supreme Court of Appeals of West Virginia held "that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protections" of procedural due process. The court reached this conclusion by application of West Virginia Code 1931, § 11A-3-8, holding that an owner who failed to redeem her property within the statutory period provided by the section lost all rights of ownership, and hence lost any "significant property interest" sufficient to support a due process challenge. Section 11A-3-8, by its terms, permits the owner of property acquired by the state for disposition at a tax sale to redeem his property within eighteen months of the acquisition by the state.

ARGUMENT

A. WEST VIRGINIA CODE § 11A-4-12 DENIES DUE PROCESS OF LAW TO AN OWNER WHOSE PROPERTY INTEREST HAS BEEN SOLD AT A TAX SALE WHEN THE SOLE NOTICE OF THE SALE IS BY A PUBLICATION NAMING THE OWNER AS AN UNKNOWN DEFENDANT WHERE THE NAME AND ADDRESS OF THE OWNER ARE KNOWN OR VERY EASILY ASCERTAINABLE.

In Part IV of his opinion for the West Virginia Supreme Court of Appeals, Chief Justice Haden implicity recognized, in the absence of a statute of limitations, the constitutional deficiency as applied to the appellant of § 11A-4-12 under the test announced by the Court in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

More particularly, this court stated:

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id.

The obvious application of the *Mullane* doctrine to the circumstances under consideration here has been noted by the commentators:

> In almost every tax sale case the name and address of the property owner will be readily ascertainable, either from the tax roles, the county land records, or otherwise. A direct application of the *Mullane* doctrine would lead to the conclusion that notice by publication alone is unconstitutional and that some form of personal notice by mail must be provided.

Note, "The Constitutionality of Notice by Publication Tax Proceedings," 84 *Yale L. J.* 1505, 1511 (1975); *accord,* Note, "Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication," *25 Syracuse L. Rev.* 769, 775 (1974); Legg, "Tax Sales and the Constitution," 20 *Okla. L. Rev.* 365, 375 (1967).

In a recent California decision, the court reviewed the application of *Mullane* by this Court and held that landowners whose property had been sold to defendants at a tax sale had been denied due process since notice of the sale had been provided only by publication. *Johnson v. Alma Investment Co.,* 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975). The owners had lived at the same address since 1951 and had purchased property in 1962, which was subject to assessment by the local water district. When the district's assessment roll was compiled in 1964, the owners' address did not appear on the roll since names and addresses of property owners were acquired from the tax roll of the county tax assessor. At the time that roll failed to carry the owners' address, although the address was carried on the records of the tax *collector* as early as 1963.

As a result, notice of the delinquency of the water district assessment was accomplished, pursuant to a state statute, solely by publication, and the property was subsequently sold at a tax sale. The owners brought suit to quiet title against the purchasers at the tax sale. The court of appeal held that to the extent that the code section authorized notice of assessment by publication alone where the address of the owner was known or could be ascertained with reasonable diligence, the section was constitutionally deficient as a denial of due process to the owners. Since, when the water district assessment roll was compiled, the address of the owners was available from the county tax collector's records, the address was ascertainable with reasonable diligence, and the sale of the property was void.

The present case presents similar but even more striking facts than those in *Johnson.* At the time of the tax sale, the appellant had lived at the same address for nearly

twenty years. R. 149. The interest had been recorded in her name since the execution of the deed to her by her son in 1937. In the notice by publication, the appellant's name as well as her address were omitted, and the property interest was incorrectly described. This was hardly "notice reasonably calculated, under all the circumstances," to alert the appellant that she was about to lose her interest for a tax deficiency.

In another decision by a state court, a tax sale of mineral interest was held to be void as a violation of due process under the fourteenth amendment, where the notice of sale, pursuant to a state statute, was by publication only. *Chapin v. Aylward,* 204 Kan. 448, 464 P.2d 177 (1970). The court, applying the *Mullane* test, held that although neither the mineral deed nor the records in the county treasurer's office gave the address of the owners, notice by publication was insufficient where the address could have been discovered from the personal property tax or real estate tax rolls.

Both the *Johnson* and the *Chapin* courts reached their conclusions after reviewing another decision by this Court in the wake of *Mullane.* In that case, *Walker v. City of Hutchinson,* 352 U.S. 112 (1956), this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on the official records, was insufficient notice to meet the requirements of due process. The *Johnson* court also referred to the Court's decision in *Schroeder v. City of New York,* 371 U.S. 208 (1962), in which notice by publication and posting on trees and poles within the vicinity of the owner's land was held to be insufficient notice of condemnation proceedings where the owner's name and address were readily ascertainable from both deed records and tax rolls.

Other post-*Mullane* decisions by this Court also point to the substantiality of the federal question involved in this case. In *Covey v. Town of Somers,* 351 U.S. 141 (1956), notice by publication, mailing, and posting given to an incompetent without a guardian prior to foreclosure of a tax

lien was held insufficient to amount to due process. In the same year, in *Wisconsin Electric Power Co. v. City of Milwaukee,* 352 U.S. 948 (1956), this Court, in light of *Walker,* vacated the judgment of the court below that statutory notice by publication of paving assessments was adequate compliance with the demands of due process.

It is patently clear, therefore, that the notice provisions of the West Virginia statute violate the dictates of this Court's decisions in *Mullane* and its progeny, and violate the due process clause of the fourteenth amendment.

B. WEST VIRGINIA CODE § 11A-3-8 DENIES DUE PROCESS OF LAW TO AN OWNER WHOSE PROPERTY INTEREST HAS BEEN SOLD AT A TAX SALE WHEN THE STATUTE IS INVOKED TO BAR THE OWNER FROM ATTACKING THE VALIDITY OF THE SALE.

In its second aspect, this appeal presents this Court with the precise issue found not to be presented to it in *Paschall v. Christie-Stewart, Inc.,* 414 U.S. 100, 102 n. 4 (1973), namely "[w]hether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim. . . ."

In the *Chapin* decision, discussed in the preceding section, the court directly addressed this issue and held that the Kansas statute of limitations pertaining to actions to set aside a tax sale could not be invoked against the owners who had been denied due process of law by the use of publication notice. This was hardly a novel theory. In the words of one commentator:

> A statute . . . which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.

2. *T. Cooley, A Treastise on the Constitutional Limitations* 769 (8th ed. R. Carrington 1927).

Another observer has noted the prevalence of such statutes and their potential effect.

> In most, if not all, of the American states there are upon the statute books laws which limit the right of the former owner of land sold for taxes to bring his action to test the validity of the tax title, to a much shorter period than that prescribed by the common law for the trial of titles to land. . . . [T]hey have been so worded that if applied literally, they would make a tax title entirely impervious to attack, after the lapse of the given period, no matter what irregularities or defects may undermine it, and irrespective of the fact of possession or any of the other circumstances thought material in such cases. Notwithstanding the large control of the legislature over remedies and over the limitation of actions, it may well be doubted whether such a result can lawfully be accomplished in all cases.

H. Black, A Treatise on the Law of Tax Titles § 492 (2d ed. 1893).

It is hardly surprising that there exists considerable precedent dating back over a century that due process will not allow a state statute of limitations to be utilized to bar a challenge to the validity of a tax sale. In perhaps the earliest of these decisions, *Groesbeck v. Seeley,* 13 Mich. 329 (1865), the holder of a tax deed brought an action in ejectment against the property owners who offered to show in defense that the taxes for which the lands had been sold were illegal for noncompliance with the statutes. The trial court had barred this defense under the limitations provision of the tax laws. The appellate court held the provision to be invalid as so applied, recognizing the import of a contrary holding:

> If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally. It would in either case be nothing more nor less than depriving

> one of his property without any legal process, and is simply confiscation by ministerial and not judicial action.

Id. at 344.

A similar case came before the high court of a sister state in the following year. In *Baker v. Kelley,* 11 Minn. 480 (1866), the owners brought ejectment against the holders of a tax deed, asserting that the property had not been advertised for sale as required by the statute. As a defense, the holders of the tax deed asserted a limitations statute which barred suits instituted after one year had elapsed since the recording of the tax deed. The court posed the question thusly:

> But suppose it is intended by this law to require the original owner to commence an action within the time fixed or be forever barred from testing or questioning the validity of the assessment or sale? Is such a law sanctioned by the Constitution?

Id. at 495. In answer, the court offered the following quotation from Justice Comstock of the New York Court of Appeals:

> To say, as has been suggested, that the "law of the land," or "due process of law," may mean the very act of the Legislature which deprives the citizen of his rights, privileges or property, leads to a simple absurdity.

Id. at 497. Thus, as Justice Seldon said in the same New York case:

> It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution.

Id. at 498. The *Baker* court concluded, under these principles, that the limitations provision could not be sustained and that the plaintiff owners had the right to show that the sale was invalid.

In yet another nineteenth century decision, the court held a similar limitations provision to be a denial of due process. *Dingey v. Paxton,* 60 Miss. 1038 (1883), was an action in ejectment by the heirs of the holder of a deed to certain property against the holder of a tax deed. Notwithstanding the fact that the deed was found to be based upon an assessment void for uncertainty in the description of the land, the defendants asserted that the suit was barred by the limitations provision. The court rejected this defense.

The *Dingey* holding was reaffirmed in *Leavenworth v. Claughton,* 197 Miss. 606 20 So. 2d 821 (1945). It was held in that case that a limitations provision of the tax statute which barred any action by a property owner to defeat the title of the state or its patentees was unconstitutional as "an effort at forced conveyance by legislative fiat. That is not due process of law." 20 So. 2d at 822. Thus, the purchaser at an invalid tax sale was not permitted to plead the statute. In the instant case the statute, § 11A-3-8 was not pleaded or asserted as an affirmative defense. (See W. Va. R. C. P. No. 8 (c). requiring specific defenses including a statute of limitations to be pleaded). In this case the Court pleaded this statute of limitations for the appellees; for that matter, under the statute, 11A-3-8, discovered by the Court and turned by the Court into a statute of limitations, the Court held that the former owner was barred even before the suit to sell was instituted, leaving in that case, hardly a justifiable proceeding. Certainly, not a proceeding the dignity of the Court should be allowed to honor.

Relying upon, *inter alia,* Judge Cooley's treatise quoted above and the foregoing cases, the court in *Murrison v. Fenstermacher,* 166 Kan. 568, 203 P.2d 160 (1949), held a state limitations statute similar to those discussed above to be in violation of constitutional due process.

In the present case, the Supreme Court of Appeals of West Virginia has reached a conclusion which is even more of an "absurdity" than those put forth by the holders of tax titles

in the preceding cases. By its interpretation of § 11A-3-8, the West Virginia court has held that an owner of property is barred from asserting the invalidity of a tax sale by the running of a statute of limitations *prior to the sale.* Thus, under the court's holding, Mrs. Pearson was barred from asserting the invalidity of the sale *even before the sale occurred.* The court reached this result by indulging in the fiction that the assessment of a tax delinquency is a "sale" vesting title in the state which triggers the limitations provision of § 11A-3-8. That this is a fiction is indicated by *West Virginia Const.* art. 13, § 4, which provides that delinquent lands "*shall* . . . be sold to the highest bidder." (Emphasis added; the section is set out in full in Appendix C). The acquisition of the lands by the state is merely a step in the process of transferring title to a tax purchaser. By the terms of § 4, the state "shall" sell the land to the highest bidder; it is not empowered to retain the land for its own use. On this point, a quotation from the *Baker* opinion may be helpful.

> Thus far, no reference has been made to the position that the Legislature, by section 2 of said act, divested the plaintiff of his title to the property, and declared it forfeited to the State. . . . If the legislature by this section attempted to do more than confer on the State the power to take such further steps as were necessary in the collection of the delinquent taxes, or in the perfection of tax titles, then it overstepped the limits which the constitution has fixed to its authority.

11Minn. at 499.

It would be strange indeed if a state could bar a property owner from asserting the invalidity of a tax sale of his property based upon constitutionally defective notice by invocation of a statute of limitations which is triggered by such defective notice. It would be stranger still if a state could bar a property owner from asserting the constitutional defect even before it has occurred. Yet this is exactly what the court in this case has purported to do.

CONCLUSION

The West Virginia statutes have been applied by the Supreme Court of Appeals of that state to deny the appellant due process of law as guaranteed by the fourteenth amendment to the United States Constitution. This Court should review and reverse the decision below.

Respectfully submitted,

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APPENDIX

NO. 13257

CECLE G. PEARSON

V.

W. P. DODD, ET AL.
and
COLUMBIA GAS TRANSMISSION CORPORATION

Kanawha County Affirmed

Haden, Chief Justice

1. "To justify the application of the doctrine of *res judicata,* '* * * there must be a concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the person for or against whom the claim is made.' Opinion. *Marguerite Coal Co. v. Meadow River Lumber Co.,* 98 W.Va. 698." *Syllabus, Hannah v. Beasley,* 132 W.Va. 814, 53 S.E.2d 729 (1949).

2. Delinquent lands are those upon which the owners have failed to pay property taxes and which have been listed by the sheriff as delinquent and, at public sale, sold by him to individuals or purchased by him for the State.

3. Forfeited lands are those which the owners have failed to enter for assessment on the land books and for which no property taxes have been paid for five consecutive years; when both events occur, the State's title arises and perfects by operation of law.

4. Under *W.Va. Code* 1931, 11A-4-39a, as amended, an erroneous entry on the land books cannot result in forfeiture provided the identity of the land intended by such entry can be ascertained.

5. Under *W.Va. Code* 1931, 11A-4-33, as amended, a purchaser at a tax sale, who has obtained a deed to the State's title from the deputy commissioner, has a perfect title to the property interest sold by the State, unless the former owner of the interest, being one required by law to have his interest separately assessed and taxed, has done so and has paid all taxes due thereon or unless the rights of such former owner are saved expressly by the prohibition of *W.Va. Code* 1931, 11A-4-27, as amended, or protected by reason of such person's disability, as recognized in *W.Va. Code* 1931, 11A-4-34, as amended.

6. Inasmuch as the primary purpose of the notice requirement contained in *W.Va. Code* 1931, 11A-4-23, as amended, is to encourage attendance and bidding at the tax sale, a failure to comply literally with such provision does not inure to the benefit of a former owner of property sold at the tax sale.

7. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

8. The Fourteenth Amendment's protection of "property" extends protection to any significant property interest, including statutory entitlements. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

9. *W.Va. Code* 1931, 11A-3-8, as amended, gives a former owner of delinquent land whose interest is not otherwise saved and protected, a statutory entitlement, that is, a right to redeem the land which he formerly owned, at any time within eighteen months of the date of the State's purchase of the property. If redemption does not occur within such period, then this right no longer exists, because absolute title has vested in the State.

10. The State cannot sell interests in land in an action

authorized by *W.Va. Const.,* Art. XIII, § 4 unless the former owner's interest in property is then irredeemable and the State's title is vested and perfected.

11. *W.Va. Code* 1931, 11A-4-18, as amended, gives a former owner of delinquent land the opportunity to petition the circuit court for permission to redeem such land at any time before confirmation of sale. Under this provision, it is purely discretionary with the court whether to accede to the redemption request.

12. The mere opportunity to redeem under *W.Va. Code* 1931, 11A-4-18, as amended, is extended to a former owner by the Legislature as an act of grace. This opportunity does not give, or restore to, a former owner a significant property interest nor accord him the status of an "interested party" in the circuit court sale, so as to invoke the constitutional protections of due process.

13. "While a court is not compelled to accept legislative statements of intent and findings of facts when the statements contained therein are not warranted in law, such statements are entitled to great weight in support of the presumption that the Legislature does not intend to offend the requirements or inhibitions of the West Virginia Constitution." *Syllabus* point 2., *State ex rel. Goodwin v. Rogers,* W.Va. , 217 S.E.2d 65 (1975).

14. The determination of the State to dispose of its vested interest in forfeited and delinquent lands, to authorize a judicial sale by civil action pursuant to *W.Va. Code* 1931, 11A-4-1, *et seq.,* as amended, and to proceed such action by order of publication in the names of former owners so as to identify the interests to be sold, does not violate the Due Process Clauses of the West Virginia and United States Constitutions, as respects such former owners.

15. *Syllabus* point 9. prefixed to the decision of *Work v. Rogerson,* 149 W.Va. 493, 142 S.E.2d 188 (1965) is disapproved to the extent that its holding fails to distinguish the redemptive right which is a statutory entitlement under *W.Va. Code* 1931, 11A-3-8, as amended, and the mere op-

portunity to petition for redemption which is an extension of legislative grace under *W.Va. Code* 1931, 11A-4-18, as amended.

Haden, Chief Justice:

This is an appeal from a final order of the Circuit Court of Kanawha County which held that the appellant, Cecle G. Pearson, did not own any part of the oil and gas interest contended for in her action to quiet title against the appellees, W. P. Dodd, Ernestine Dodd, his wife, and Columbia Gas Transmission Corporation.

The facts in this case are essentially undisputed. By a deed from her son, H.C. Pearson, Jr., dated February 20, 1937 and recorded August 9, 1937, the appellant acquired a full one-fourth of all the oil and gas in sixty-eight acres of land, known as the Sarah A. Null tract, located in Union District, Kanawha County. The appellant did not enter her name into the land books and thus, the assessment involved in this action appeared under Union District, Kanawha County, as follows:

"1938	O'Dell, W. H. (predecessor in title to H. C. Pearson, Jr.) and H. C. Pearson, Jr. 1/2 O & G Int 68A Wts Martins Br.
1939) thru) 1943)	Pearson, H. C. Jr. 68 A. 1/4 O & G Int Wts Martins Br.
1944) thru) 1957)	Pearson, H.C. Jr. 68 A. 1/8 O & G Int Wts Martins Br.
1958) thru) 1966)	Pearson, H. C. Jr. 68 A. 1/8A O & G Int Wts Martins Br."

Although the tax tickets contained the name of H. C. Pearson, Jr., the senior Mr. Pearson, appellant's husband, paid the taxes for his wife's mineral interest in the Sarah A. Null tract from the time of the first assessment in 1938 until 1960. H. C. Pearson, Jr. died in 1958; the taxes for that year were assessed and paid in his name. The 1959 and 1960 taxes, likewise assessed, were paid also. In 1961, because of an oversight, Cecle Pearson failed to pay the real estate taxes on this interest. As a result, the assessment went delinquent, and in 1962, the property was sold to the State. In 1964, the property was certified by the State Auditor. Two years later the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County instituted a suit, in the name of the State of West Virginia, for the sale of this and other delinquent lands. By a tax deed, the purchaser, W. P. Dodd, was conveyed "68 Acres, 1/8 Acre Oil and Gas interest, . . . being the same property conveyed to H. C. Pearson, Jr., by W. H. O'Dell . . . in Deed Book 428, at page 53. . . ."

The only notice given of the sale of this delinquent land was by way of publication in the Charleston Daily Mail and the Charleston Gazette on April 16 and April 23, 1966. The public notice misdescribed the interest as "68 Acres, *1/8* Acre oil and gas interest" and listed the former owner as *"H. C. Pearson, Jr."* (Emphasis supplied). The Dodds obtained the tax deed on April 26, 1966 for $30.00. After ratifying a former lease agreement with Columbia Gas, the Dodds granted Columbia Gas the right to drill a gas well in 1967. In late March of 1968, at a cost of $104,500.87, Columbia Gas completed the well on the 68 acres in question with an initial open flow of one hundred million cubic feet of Newburg gas. On July 26, 1968, Cecle G. Pearson paid the State Auditor $101.86 in an attempt to redeem her interest which, she asserted, had forfeited for non-entry for the years 1938 to 1968. Cecle G. Pearson then commenced this action against the Dodds and Columbia Gas on October 15, 1968.

The appellant has assigned several errors as grounds for

reversal, but the ultimate issue in the case remains as the parties agreed by the circuit court order of July 9, 1971:

> "[W]hether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interests asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the same oil and gas interest."

For reasons which shall appear, this Court is of the opinion that the appellant owns no part of the mineral interests in the subject property, and thus, that the decision of the Circuit Court of Kanawha County is correct.

The Court believes that the following questions, raised by the appellant, merit our consideration:

1. Whether the suit, entitled *State v. L. (Lemuel) A. Whittington, et al.*, upon which the tax deed is based is *res adjudicata* to the interest of the appellant?

2. Whether a forfeiture due to non-entry, or a delinquency due to non-payment, occurred?

3. Whether various mistakes, concededly made during the tax sale proceeding, rendered such proceeding void or whether these mistakes were cured by *W.Va. Code* 1931, 11A-4-33, as amended?

4. Whether *W.Va. Code* 1931, 11A-4-12, as amended, allowing a "delinquent sale" action to proceed against a former owner, who has notice of the action, if at all, through an order of publication, merely, is unconstitutional?

I

Appellees assert that the circuit court suit for the sale of lands, entitled *State v. L. (Lemuel) A. Whittington, et al.* was *res adjudicata* to the action brought by the appellant below. Appellees cite *Robinson Improvement Co. v. Tasa Coal Co.*, 143 W.Va. 293, 101 S.E.2d 67 (1957) for this proposition. *Robinson*, however, is not controlling because the criteria for *res adjudicata, succinctly set forth in*

Hannah v. Beasley, 132 W.Va. 814, 53 S.E.2d 729 (1949), are not present:

> "To justify the application of the doctrine of *res judicata*, '* * * there must be a concurrence of four conditions, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.' Opinion. *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W.Va. 698." *Id. syllabus.*

Because the foregoing conditions were not satisfied, the circuit court below had the power to entertain the suit brought by the appellant, and consequently, this Court has the authority to consider the merits of this case on appeal.

II

By way of introduction, a lead article, entitled "Taxation and Land Titles Under Article XIII of the West Virginia Constitution," 65 *W.Va. L.Rev.* 263 (1963), provides a simple and workable explanation of what the terms, "delinquency" and "forfeiture" mean:

> "*Delinquent Lands:* Delinquent lands are those upon which the owner failed to pay taxes and which have been listed as delinquent by the county sheriff and purchased by him for the state at public sale. [or sold by him to "private" purchasers, i.e. individuals, at the sale. *W.Va. Code* 1931, 11A-3-4, as amended]. . . . The terms 'delinquent' and 'forfeited' are vastly different.
>
> "*Forfeited Lands:* Lands become forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years. This land is forfeited to the state by operation of law and no formalities are necessary to convey title to the state. Lands are forfeited only for non-entry, not for non-payment of taxes." *Id.* at 268-69.

The distinction between the two was first recognized by this Court in *Waggoner v. Wolf,* 28 W.Va. 820, 1 S.E.25 (1886), when it stated:

> "There is a vast difference between delinquency and forfeiture. The former means simply that the owner has failed to pay the taxes due on his land, and in consequence it has been returned delinquent and is subject to the State's lien for the taxes and liable to be sold therefor. But by forfeiture the former owner is entirely divested of all his interest in the land and the title thereto becomes absolutely vested in the State. By reason of the delinquency the State may sell the land under her lien for taxes, while a forfeiture vests the absolute title in the State. *Id.* at 828.

The facts reveal that the name of Cecle G. Pearson, the appellant, who obtained the subject interest in 1937, was not entered into the land books from 1938 to 1966. Rather her son's name, H. C. Pearson, Jr., from whom she received the property, remained on the land books during this entire period. If Mrs. Pearson's failure from 1938 to 1943 to enter her own name constituted a forfeiture, then the State automatically would have acquired ownership in the subject interest in 1943. The subsequent delinquency sale in 1962 would have been meaningless. See *Bailey v. Baker, et al.,* 137 W.Va. 85, 68 S.E.2d 74 (1951).

Forfeiture has been described as "a harsh, even dreadful, remedy"; courts generally disfavor it "and never apply it except where the law clearly warrants." *State v. Cheney, et al.,* 45 W.Va. 478, 480, 31 S.E. 920, 921 (1898). In fact, there exists a presumption against a forfeiture of title for non-entry until overthrown by the State. *State v. Hines-Bailey Corp.,* 103 W.Va. 180, 136 S.E. 780 (1927); *State v. Bear Mountain Coal Co.,* 99 W.Va. 183, 128 S.E. 84 (1925); *White Flame Coal Co. v. Burgess,* 86 W.Va. 16, 102 S.E. 690 (1920); *Wildell Lumber Co. v. Turk,* 75 W.Va. 26, 83 S.E. 83 (1914). Pertinent to the present facts, this Court has held that entry on the land books in the name of the former owner, under the same title,

prevents forfeiture. *Blake v. O'Neal,* 63 W.Va. 483, 61 S.E. 410 (1908). See also, *Stiles v. Layman,* 127 W.Va. 507, 33 S.E.2d 601 (1945). Although the facts in *Blake* are not identical to those in the present case, the similarities make the *Blake* decision persuasive. In both cases, an entry, albeit erroneous, on the land book did exist in the name of a relative, who was the former owner; furthermore, taxes were being paid by the true owners despite the erroneous entries.

These holdings are consistent with the Legislature's clear intent in *W.Va. Code* 1931, 11A-4-39a, that no entry shall result in a forfeiture "provided the identity of the land intended by such entry can be ascertained." This is true, despite errors in "the way in which the name of the owner, the area, the lot or tract number or reference, the local description, the statement of the interest or estate or other particulars are stated." *Id.* for these reasons, this Court is of the opinion that a forfeiture did not occur. Thus, title remained in Cecle G. Pearson until 1962 when the interest was sold to the State because of the delinquency occurring in 1961.

III

The appellant has asserted, in the alternative, that if there was no forfeiture, then the various mistakes made during the tax sale proceeding, resulting from delinquency, constituted a total failure of the deputy commissioner's duties, voiding the tax deed acquired by the Dodds. *W. Va. Code* 1931, 11A-4-33, as amended, which cures mistakes made in the tax sale proceeding, provides:

> "Whenever, under the provisions of this article, a purchaser, his heirs or assigns, shall have obtained a deed for any real estate from the deputy commissioner, he or they shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem, unless such person is one who,

being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of sections twenty-seven or thirty-four [§ 11A-4-27 or 11A-4-34] of this article. The deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to the date of the sale.

"Except as otherwise provided in this section, no irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title thereby acquired."

This curative provision is nearly identical in language to *W. Va. Code* 1931, 11A-3-29, as amended, which is entitled "Effect of irregularity on title acquired by purchaser."[1] This Court has held that such provisions apply "only to voidable deeds and not to deeds which are void because of jurisdictional defects." *Shaffer v. Mareve Oil Corp.*, W.Va. , 204 S.E.2d 404, 408, 409 (1974). See also, *Gates v. Morris*, 123 W.Va. 6, 13 S.E.2d 473 (1941).

The purposes of these particular provisions and of Chapter 11A, Articles 3 and 4 in general, are explicitly stated in *W.Va. Code* 1931, 11A-3-1 and 11A-4-1 as respectively amended:

"In view of the paramount necessity of providing regular tax income for the State, county and municipal

[1]"No irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is, by the provisions of sections sixteen, thirty, thirty-one, or thirty-two [§§ 11A-3-16, 11A-3-30, 11A-3-31 or 11A-3-32] of this article, expressly made ground for instituting a suit to set aside the sale of the deed.

"This and the preceding section [§ 11A-3-28] are enacted in furtherance of the purpose and policy set forth in section one [§ 11A-3-1] of this article."

governments, particularly for school purposes; and in view of the fact that tax delinquency, aside from being a burden on the taxpayers of the State, seriously impairs the rendering of these essential services; and in view of the further fact that delinquent land, with its attendant problems made acute by the events of the past decade, not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; now, therefore, the legislature declares that its purpose in the enactment of this and the following article [§ 11A-4-1 et seq.] is threefold: First, to provide for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions; second, to provide for the transfer of delinquent lands to those more responsive to, or better able to bear, the duties of citizenship than were the former owners; and third, in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase."

"In furtherance of the policy declared in section one [§ 11A-3-1], article three of this chapter, it is the intent and purpose of the legislature to establish a judicial proceeding for the sale of land for the school fund, which will be as expeditious, inexpensive and informal as possible without violating any claim which may fairly and properly be made on behalf of the former owner . . . . "

The appellant asserts that the following errors were so pervasive as to constitute a jurisdictional defect, rendering void the tax sale to the Dodds: (1) the notice by publication contained the wrong name of the former owner; (2) it described the land improperly; (3) it listed the size of the land incorrectly; and (4) only ten days notice of the circuit court sale was given instead of the fifteen required under *W.Va. Code* 1931, 11A-4-23, as amended.

Individually, the first three mistakes have been held by this Court to be cured by predecessor statutory provisions. A misnomer of the former owner did not void the tax sale in *Jarrett v. Kimbrough*, 87 W.Va. 643, 105 S.E. 918 (1921), or in *Hamill v. Glover*, 74 W.Va. 152, 81 S.E. 970 (1914); a misdescription of a lot was held to be cured in *Matheny v. Jackson*, 83 W.Va. 553, 98 S.E. 620 (1919); and a misdescription of the amount of land has been said to be cured in *Leach v. Weaver*, 89 W.Va. 49, 108 S.E. 494 (1921), in *Robey v. Wilson*, 84 W.Va. 738, 101 S.E. 151 (1919), and in *Fleming v. Charnock*, 66 W.Va. 50, 66 S.E. 8 (1909).

Furthermore, the Legislature has been clear in revealing what it considers to be curable. With regard to the first error, i.e. the naming of H. C. Pearson, Jr. instead of Cecle G. Pearson, *W.Va. Code* 1931, 11A-4-12, as amended, specifically provides "that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings . . . . " As previously noted, *W.Va. Code* 1931, 11A-4-39a, as amended, considers these types of mistakes as not being so serious as to result in forfeiture. By analogy, such mistakes do not render the tax sale proceeding void. This is logical and fair in view of the fact that the appellant paid tax tickets for several years under the name of her son. She had ample opportunity to cure these mistakes herself; at any time, she could have notified the assessor and tax collecting officials of the proper entry and description of her interest, as the law requires. See *W.Va. Code* 1931, 11A-4-2, as amended.

Neither is the error in the giving of only ten days notice so crucial as to affect the validity of the tax sale proceeding. As correctly pointed out in the appellees' brief, the primary purpose of the notice requirement in *W.Va. Code* 11A-4-23, as amended, is "[i]n order to encourage attendance and bidding at the sale" and not to notify the former owner as such.

Thus, this Court is of the opinion that the errors complained of were cured by *W.Va. Code* 1931, 11A-4-33, as amended.

IV

The appellants challenge the constitutionality of *W.Va. Code* 1931, 11A-4-12, as amended, asserting that it is violative of the due process clause of the Fourteenth Amendment in that it provides for service of process upon former owners by publication only:

> "Upon the institution of a suit as provided in section ten [§ 11A-4-10] of this article, the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A. B. et al.; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.
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> "The order shall be published as a Class III-O legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The cost of such publication shall be charged ratably to each item listed in the suit, and shall be taxed to the State as part of its costs in the suit and paid as hereinafter provided.
>
> "In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all

escheated land, and to all waste and unappropriated land, and must under the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of

land sold under any decree made or to be made in any such suit."

The very similar predecessor statute was attacked as unconstitutional in the case of *State v. Simmons,* 135 W.Va. 196, 64 S.E.2d 503 (1951), but the Court upheld the statute declaring it not to be "violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia." *Id., syllabus* point 1. The *Simmons* Court reviewed West Virginia's legislative and judicial history in this very difficult area of land titles and taxation, and we need not elaborate any further.[2] Appellant asserts, however, that the *Simmons* case is outmoded in view of the recent United States Supreme Court cases (i.e. *Sniadach, Fuentes,*[3] etc.) that have extended the Fourteenth Amendment's procedural due process guarantees of reasonable notice and opportunity to be heard. Appellant relies heavily upon the case of *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which was decided nine months prior to *Simmons* and of which the *Simmons* Court failed to take note. The appellant contends that *W.Va. Code* 1931, 11A-4-12, as amended, does not meet the adequacy of notice test established in *Mullane*. In *Mullane*, the Court stated that;

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[2]For a more detailed account of West Virginia's unique problems during its early history, see "Taxation and Land Titles Under Article XIII of the West Virginia Constitution," 65 *W.Va. L.Rev.* 263 (1963). By way of illustration, this Court in describing the situation in West Virginia in 1871, stated that the "'uncertainty and confusion of the land titles baffles the investigation and defies the ingenuity of the most assidious and astute . . .'" *Id.* at 267, quoting *Twiggs v. Chevallie,* 4 W.Va. 463, 469 (1871). See also, Colson, "Service of Process In A Delinquent Lands Proceeding - A Suit That Is Not A Suit," 54 *W.Va. L.Rev.* 55 (1951), wherein the delinquent land problems in West Virginia in the 1940s are fully developed, being described as "comparable to that faced by the state immediately after its formation." *Id.* at 56. See also *W.Va. Code* 1931, 11A-4-39, as amended.

[3]*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*,at 314 of the United States Report.

In establishing this test, the *Mullane* Court generally criticized the giving of notice by publication and specifically condemned such notice where the names and addresses of interested parties are known or easily ascertainable.

In establishing the test for adequacy of notice, the *Mullane* Court minimized the historical significance given to the type of action involved with regard to notice requirements. Explaining that the distinctions between *in rem* and *in personam* were ancient and unclear, the Court concluded:

> "[W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Id.*, at 312 of the United States Report.

This is helpful in our consideration of the present case because the sale of lands for the school fund under *W.Va. Code* 1931, 11-4-1, *et seq.*, as amended, has been described in a very indistinct manner by the West Virginia Court as "a proceeding *inter partes*, and substantially one *in rem*."[4] *State v. Simmons, supra*, at p. 206 of the West Virginia

[4]In analyzing this statement, one commentator has remarked: "It is obviously not a suit *inter partes* in the normal sense of the term because there is no necessary and interested party defendant. It is equally not a proceeding *in rem* to effectuate a forfeiture of title to the state, or to foreclose the interest or the rights of any interested parties, because there are none. Nor is it a suit *quasi in rem* which is a cross between the two. Probably the most than can accurately be said is that as a judicial proceeding this one is *sui generis*." Colson, *supra*, at 64 (1951).

Report. Thus, the *Mullane* test for adequacy of notice substantially discourages judicial reliance upon semantical distinctions in the granting or denying of relief based upon the characterization of the type of action involved.

Of course, the *Mullane* due process requirement, that notice be reasonably calculated to apprise "interested parties" of the pendency of action, presupposes under the Fourteenth Amendment that the parties retain or have some property interest to be affected by the action. In other words, if a person has no interest in the land that is being sold for the school fund, then he has no constitutional right to receive the kind of notice that *Mullane* demands. What exactly is meant by an "interested party" is not certain; however, the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) did shed further light on the matter when it stated:

> "The Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, . . . including statutory entitlements." *Id.* at p. 87 of the United States Report.

Thus, the crucial question for our determination is whether the prerogative contained in *W.Va. Code* 1931, 11A-4-18, as amended,[5] gives a former owner of property a significant interest, or something less, in the circuit court sale of such property. Under this provision, a former owner of delinquent land is given the opportunity to apply at any time before confirmation of sale for permission to redeem

[5]*W.Va. Code* 1931, 11A-4-18, as amended, provides in pertinent part: "The former owner of any forfeited or delinquent land, or any other person who was entitled to redeem such land under the provisions of section eight [§ 11A-3-8], article three of this chapter, may file his petition in such suit with the circuit court . . . at any time before confirmation of sale thereof requesting permission to redeem such land to the extent that title thereto remains in the State."

the interest formerly owned by him. This provision, however, does not confer on former owners an automatic right to redeem, and for this reason must be distinguished from *W.Va. Code* 1931, *11A-3-8, as amended,*[6] which grants a former owner of delinquent land the right to redeem at any time within eighteen months after the date of the purchase by the State.

A great deal of confusion exists in this area, we believe, because historically this Court has considered redemption in general terms. Rarely has this Court acknowledged the distinction between *W.Va. Code* 1931, 11A-3-8 and 11A-4-18, as respectively amended. As a result, this Court has referred to redemption generally as a "right" in several cases, as a "privilege" in others, and as a "right or privilege" in still others. Two lines of West Virginia cases developed from this confusion: one, holding that the "right" to redeem was a substantial property right to be protected by the courts; the other, regarding redemption as a mere privilege or grace accorded by the State which, at any time would be restricted or revoked at the pleasure of the Legislature. See *State v. Simmons, supra,* at 215-217. The *Simmons* Court was aware of the distinctions [between *Code,* 11A-3-8 and 11A-4-18, *supra*] but failed to observe them in its analysis. The *Simmons* Court believed that "the exact character of the right or the privilege of redemption is unimportant or inconsequential," (*Id.* at 216, 217) but this is not true in light of the previous quote from *Fuentes v. Shevin, supra.*

Two opinions subsequent to *Simmons* compounded the confusion with respect to what exactly is conferred by

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[6] *W.Va. Code* 1931, 11A-3-8, as amended, provides in pertinent part: "The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution."

these provisions. First, in the case of *Beckley v. Hatcher,* 136 W.Va. 169, 67 S.E.2d 20 (1951); this Court made the following ambiguous statements;

> "The former owners, under the provisions of the statute mentioned above, [*W.Va. Code* 1931, 11A-3-8, as amended] did not own the property against which the assessment was made, but only had the privilege of redeeming the same as a matter of grace. (citations omitted) The privilege of redeeming the land was ended upon the confirmation of the sale in the suits brought for the benefit of the school fund. See *State v. Gray,* 132 W.Va. 471, 52 S.E.2d 759; Sec. 33, Art. 4, Chapter 160, Acts of the Legislature, 1947." *Id.,* at p. 175 of the West Virginia Report.

In the first sentence, the Court held that the method provided a former owner to redeem under *W.Va. Code* 1931, 11A-3-8, as amended, was a "privilege." In the second sentence, the Court explained that this privilege ended upon the confirmation of sale in the suits brought for the benefit of the school fund, (citing by mistake *W.Va. Code* 1931, 11A-4-33, as amended, instead of *W.Va. Code* 1931, 11A-4-18, as amended). The point is that, by labelling redemption a "privilege" in both instances, the Court, impliedly, has equated the right to redeem [under *Code,* 11A-3-8, *supra*] with the opportunity to apply for permission to redeem [under *Code,* 11A-4-18, supra].

As a further example, the Court in *Work v. Rogerson,* 149 W.Va. 493, 142 S.E.2d 188 (1965) also misconstrued these provisions, in a *syllabus* point, as creating entitlements of equal merit. On this occasion, the Court described both statutory means of redemption as "rights:"

> "Under the provisions of Code, 1931, 11-10-30 (now appearing in revised form as Code, 11A-3-8), property sold by the sheriff for nonpayment of taxes and purchased by the state became irredeemable at the expiration of one year [now eighteen months] from the date of such sale but the right to redeem arose again under the provisions of Code, 1931, 37-3-29 (now

> appearing in revised form as Code 11A-4-18), upon the institution of a suit by the commissioner of school lands to sell the property; and the right to redeem existed and continued until a sale and until a decree for the confirmation of the sale was made and entered by the court in such a suit, whether the state had obtained title to the property by purchase at a sheriff's sale or by forfeiture for nonentry." *Syllabus* point 9., *id.*

Although the Court's opinion in *Rogerson* does not support *syllabus* point 9., *id.*, we are impelled to disapprove the broad holding of this *syllabus* point because of the holdings which follow.

It is our belief, and we so hold, that [under *Code*, 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W.Va. Const.*, Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.*, 130 W.Va. 1, 43 S.E.2d 625 (1947). Once this suit is commenced, a former owner [under *Code*, 11A-4-18, *supra*] has only the opportunity to petition as a "privilege of redemption." But since it is purely discretionary with the court under *W.Va. Code* 1931, 11A-4-18, as amended,[7] whether to accede to the redemption request, actually it is not accurate to refer to the former owner as possessing a "privilege" of redemption.

In any event, the point of this lengthy, but necessary, discussion is to clarify the interest of the former owner

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[7] *W.Va. Code* 1931, 11A-4-18, as amended, provides in pertinent part, that "[t]he court . . . *may* by proper decree, *permit* the petitioner to redeem the land . . . . " (Emphasis supplied).

[under *Code*, 11A-4-18, *supra*] in the circuit court sale of the State's title to his former property. At the time of the circuit court proceeding, the State has absolute title in the subject property; the former owner has no ownership at all.[8] Nor does such former owner have a statutory right to redeem. The Legislature, by its statement of intent and policy found in the last paragraph of *W.Va. Code* 1931, 11A-4-12, as amended, has been explicit in this regard. The former owner's opportunity to redeem is "extended to him by the legislature as an act of grace;" furthermore, "there is no constitutional requirement that the former owner . . . be personally served with process." *Id.* With respect to these statements, this Court recognizes the general rule stated in *State ex rel. Goodwin v. Rogers*, W.Va. , 217 S.E.2d 65 (1975) that:

> "While a court is not compelled to accept legislative statements of intent and findings of facts when the statements contained therein are not warranted in law, such statements are entitled to great weight in support of the presumption that the Legislature does not intend to offend the requirements or inhibitions of the West Virginia Constitution." *Id., syllabus* point 2.

The foregoing has particular application when the subject—the grace extended by the legislative body—, is a matter of pure legislative prerogative.

Therefore, it is our opinion, and we so hold, that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protections. The

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[8] We are aware that West Virginia Constitution, Article XIII, Section 5, gives a former owner the right "to receive the excess of the sum for which the land may be sold over the taxes charged . . . . " But this interest has been held consistently to give a former owner an interest in personal property only, and consequently, not to give him any interest in the land or any right to be a party to the proceedings for the sale of such land. *State v. Gray*, 132 W.Va. 472, 52, S.E.2d 759 (1949); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *McClure v. Maitland*, 24 W.Va. 561 (1884).

procedural due process guarantees found in such cases as *Mullane, Fuentes, North Georgia Finishing v. Di-Chem* and *Payne v. Walden,*[9] etc., do not extend so broadly as to embrace parties without a significant property interest.

Thus, in the final analysis, the conclusion reached in *State v. Simmons, supra*, still holds true:

> "In a suit to sell forfeited and delinquent lands for the benefit of the school fund, instituted under the provisions of Chapter 160, Acts of the Legislature, 1947, Regular Session, the former owner of such lands, who is named as a defendant in such suit, whether a resident or a nonresident of this State, may be proceeded against by an order of publication; and such procedure is not violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia." *Id., syllabus* point 1.

Further, since forfeiture did not occur, and the tax sale proceeding was valid, and the former owner's opportunity to redeem ended upon the "confirmation of the sale" to the Dodds [under *Code*, 11A-4-18, *supra*], the appellant's payment of $101.86 to the State Auditor was no more than a colorable attempt to redeem which did not create or restore a significant property interest.

This opinion is intended to clarify the cases of *State v. Gray, supra, State v. Simmons, supra, Davis v. Hylton,* 135 W.Va. 815, 65 S.E.2d 287 (1951), *Beckley v. Hatcher, supra*, and *Work v. Rogerson, supra*, all of which failed to distinguish between a former owner's right to redeem under *W.Va. Code* 1931, 11A-3-8, as amended, and a former owner's opportunity to petition to redeem under *W.Va. Code* 1931, 11A-4-18, as amended. It is also meant to remove any implication contained in *State v. Mason,*

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[9] *Mullane v. Central Hanover Trust Co., supra; Fuentes v. Shevin, supra; North Georgia Finishing v. Di-Chem,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *State ex rel. Payne v. Walden,* W.Va. , 190 S.E.2d 770 (1972).

W.Va. , 205 S.E.2d 819, 823 (1974), that *W.Va. Code* 1931, 11A-4-18, as amended, provides a former owner the *right* to redeem. Cases decided by this Court, which dealt with interpretation of statutes in effect prior to March 8, 1947, are inapposite to the question considered on this appeal, as those statutes were substantially different from those presently interpreted.

Within rational constraints, this Court has considered carefully every assignment of error placed before us by the appellant. Likewise, we have attempted to respond to all substantial contentions and legal propositions advanced by the excellent and exhaustive brief submitted by appellant's counsel. We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests,—often recognized in prior decisions and tenaciously maintained in statements of legislative policy—, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process.

For the reasons herein stated, the final order of the Circuit Court of Kanawha County is affirmed.

Affirmed.

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

CECLE G. PEARSON
Plaintiff,

V.

W. P. DODD
ERNESTINE DODD, his wife; and
COLUMBIA GAS TRANSMISSION
CORPORATION, a corporation,
Defendants.

CIVIL ACTION NO. 8310

JUDGMENT

This action came on to be heard by the Court upon agreed order by all of the parties that there is no just reason for delay in determining whether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interest asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the said oil and gas interest; and, the Court on April 17, 1972, having directed the entry of judgment in accordance with the Court's letter memorandum of opinion;

It is ORDERED that the Court's letter memorandum of opinion dated April 17, 1972, addressed to counsel of record for the parties, be made a part of the record as and for the Court's findings of fact and conclusions of law thereon; and

It is further ORDERED AND ADJUDGED in conformity with said findings of fact and conclusions of law that the plaintiff, Cecle G. Pearson, owns no part of the oil

and gas interest assorted in the complaint filed in this action, and that the tax deed described in the complaint filed in this action, and the other instruments based thereon, should not be set aside as a cloud upon the title of the plaintiff in and to said oil and gas interest; and that defendants recover from plaintiff statutory costs in the prosecution of their defense.

To which action of the Court is granting judgment to the defendants, the plaintiff objected and excepted.

This 19th day of June, 1972.

ENTER:

s/ Frank L. Taylor
Judge

PREPARED BY:

s/ Wm. Roy Rice
Attorney for Columbia Gas
Transmission Corporation

APPROVED BY:

s/ William E. Hamb
Counsel for Defendants,
W. P. Dodd and Ernestine
Dodd, his wife

s/ Rex Burford
Counsel for Plaintiff,
Cecle G. Pearson

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY COURTHOUSE
CHARLESTON, WEST VIRGINIA 25301

April 17, 1972

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Gentlemen:

Cecle G. Pearson vs. W. P. Dodd, Ernestine Dodd, his wife; and Columbia Gas Transmission Corporation, a corporation-Civil Action No. 8310

By the agreed order of July 9, 1971, the "central issue" in this case, to-wit: "* * * whether or not the plaintiff, Cecle G. Pearson, owns all or any part of the oil and gas interest asserted in the complaint filed herein, and whether or not the tax deed described in the complaint filed in this action and the other instruments based thereon, be set aside as a cloud upon the title of the plaintiff in and to the said oil and gas interest", was submitted for decision upon the stipulations filed, the interrogatories and answers thereto, and the depositions of Myron Maurice Miller, Joseph Calvin Crim, Cecle G. Pearson and Henry Clinton Pearson.

The mineral interest claimed by the plaintiff is described in paragraph 1 of the complaint as "one- fourth (1/4th) of all the oil and gas and gasoline, and oil and gas substances in and underlying all that certain tract or parcel of land situate, lying and being near the source of the waters of Martin's Branch, in Union District, Kanawha County, West Virginia, more particularly described as follows, to-wit: * * * * *." Said mineral interest is alleged in paragraph 2 of said complaint to be that which was conveyed to the plaintiff by H. C. Pearson, Jr. by deed dated February 20, 1937, and recorded in the office of the Clerk of the County Court of Kanawha County in Deed Book 436, at page 110.

The tax deed in question is referred to in paragraph 3 of the complaint, as follows:

> "3. By purported tax deed from William B. Maxwell, Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, to one of the defendants, W. P. Dodd, which deed bears the date June 1, 1966, and which is duly of record in the aforesaid Clerk's office in Deed Book 1467, at page 378, the said William B. Maxwell, Deputy Commissioner, attempted to convey unto one of the defendants, W. P. Dodd, the mineral interest of the said H. C. Pearson, Jr. in land more particularly described as follows:
>
> "68 Acres, 1/8 Acre oil and gas interest, Waters Martins Branch, Union District, Kanawha County, West Virginia, being the same property conveyed to H. C. Pearson, Jr. by W. H. O'Dell and Minerva E. O'Dell, his wife, by deed dated February 8, 1937, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 428, at page 53, reference to which deed is here made for a more particular description of said property."

The complaint further alleges that the interest of H. C. Pearson, Jr. was "purportedly sold to the State of West Virginia in the year 1962 for the nonpayment of property

taxes thereon for the year 1961" by William B. Maxwell, and notes that defendant W. P. Dodd is contending that said deed from Maxwell conveyed to him one-fourth of all the oil and gas, etc. owned by the plaintiff and described in the first paragraph of the complaint. The complaint, accordingly, asserts that Dodd's claim is annoying and vexatious to plaintiff's title, and thereby constitutes a cloud upon her clear and perfect title to the mineral interests.

It is asserted in paragraph 6 of the complaint that said "purported" delinquent tax sale was a nullity; and that the "purported deed and the purported suit by William B. Maxwell, Deputy Commissioner, was a nullity and that the deed from William B. Maxwell, Deputy Commissioner, to the defendant, W. P. Dodd, is a nullity and includes no part of the aforesaid land owned by the plaintiff."

While there is only one "central" issue in this case, many ancillary issues have been raised. Counsel for the plaintiff, in the memorandum submitted on August 16, 1971, under the category of *"ISSUES"*, makes eight principal contentions with regard to the "purported" sale of said mineral interest, several of which are further subdivided into more specific assertions or issues. In addition thereto, the defendants have raised questions concerning this proceeding which were not discussed in plaintiff's initial brief. While I have considered all such contentions and arguments presented in the briefs, I shall attempt herein only to set forth those reasons which, in my opinion, are most pertinent to the decision reached.

The first portion of the plaintiff's argument is addressed to the alleged "failures" in the delinquent tax sale proceeding. In my view, however, the threshold issue in this case is whether or not there was a forfeiture of the mineral interest for nonentry in 1943, or later years prior to 1961, as opposed to a delinquency in 1961 for nonpayment of taxes. Upon this issue counsel for the plaintiff, after noting the distinction between forfeited land and delinquent land, cites the statutory requirement of Code, 11A-4-13, that all

such suits be initiated by a bill containing a list of the lands included, setting forth the amount due, "indicating whether the land is forfeited, delinquent, * * *." Notwithstanding said statutory requirement, I am of opinion that regardless of whether the property in question was forfeited for nonentry, or delinquent for nonpayment of taxes, the provisions of Code, 11A-4-33 would convey whatever interest was held by the State. *Code, 11A-4-33* provides as follows:

> "Whenever, under the provisions of this article, a purchaser, his heirs or assigns, shall have obtained a deed for any real estate from the deputy commissioner, he or they shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of sections twenty-seven or thirty-four of this article. The deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to the date of the sale.
>
> " * * * * * * * "

Consequently, I am of opinion that perforce Code, 11A-4-33, the defendant, W. P. Dodd, acquired, by the Commissioner's deed dated June 1, 1966, all the State's right, title and interest in said property at the time of the conveyance. I therefore find no merit in the proposition or contention relating to forfeiture for nonentry, as opposed to delinquency for nonpayment of the taxes.

Closely related to the proposition that the mineral interest in question was forfeited for nonentry in 1943, or later years prior to 1961, as opposed to its becoming delinquent in 1961, is plaintiff's contention concerning the validity of the tax sale "because of problems of 'identity'." Notwithstanding the apparent curative effect of Code, 11A-4-39(a) in such a situation, counsel for the plaintiff contends that since said

section was enacted in 1953, without any indication that it was to be retroactive in effect, it would have no bearing on the outcome of this case. In either event, whether or not retroactive, in view of the fact that the plaintiff continued to pay the taxes on the mineral interest in question from the time of the conveyance in 1937, through the year 1960, there was no forfeiture for nonentry of the property in question prior to the effective date of said statute.

Plaintiff also asserts that Code, 11A-4-39(a) is unconstitutional in that the language of said statute allows such latitude in the taking of a person's property that it would not even be necessary for the property to be described in any recognizable fashion, nor be entered in the proper taxing district. While I have very carefully considered plaintiff's agrument in this regard, as well as the authorities cited, I do not believe that the statute is, in this respect, unconstitutional.

Before proceeding to consider the remaining substantive issues raised by the plaintiff in this proceeding, I should, perhaps, comment upon the assertion made by the defendant, Columbia Gas Transmission Corporation, to the effect that the plaintiff must recover, if at all, on the strength of her claimed title, and not on the basis of any alleged weakness of the defendants' title. While I fully agree with such assertion, I fail to see how this issue will materially affect the outcome of this proceeding. The plaintiff is simply attempting to establish her superior right by showing the invalidity of the tax deed in question; otherwise, upon these pleadings, I discern no dispute between the parties as to plaintiff's claim of title.

As noted earlier in this opinion, several contentions contesting the validity of the Commissioner's "purported" conveyance are asserted by the plaintiff. One such contention is that, perforce Code, 11-4-9, only the undivided interest proceeded against passed to the purchaser, so that, consequently, the defendant Dodd acquired only "1/8 Acre" oil and gas interest by said tax deed. Without belaboring this opinion with a lengthy discussion as to what I perceive to be the meaning and purpose of said statute, I will say that, in my view, said statute pertains only to assessments of real estate interests which are held jointly or in common, and not to a particular interest which may be erroneously described. Therefore, I do not believe that said statutory provision, restricting passage of title to only the interest proceeded against, has any application in this case. Moreover, in view of the fact that the correct interest could have been ascertained by reference to the former conveyance, the purchaser, in my opinion, acquired all the right, title and interest in and to the real estate as was, at that time, vested or held by the State.

Plaintiff also cites and relies on Code, 11A-4-11, in support of the relief sought by her. Said section imposes a duty upon the Deputy Commissioner, in a suit for the sale of any forfeited or delinquent land, to make parties defendant all unknown claimants of any interest in such lands, and requires that the Commissioner also name as a party defendant all other persons who, according to his knowledge however acquired, have or claim any interest in any of the land included in the suit. The following section, however, *Code, 11A-4-12,* appears to cure any such failure in the requirement of the preceding section, if notice by publication is given, by providing, *inter alia:*

> "* * * in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in no wise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; * * *."

Therefore, subject to my consideration of the issue at to the constitutionality of said Section 12, I find no merit in the contention regarding the Commissioner's failure to name the plaintiff in the tax proceeding.

It is also asserted by the plaintiff that insufficient notice as to the time of sale was given by the Deputy Commissioner, in violation of Code, 11A-4-33, and in disregard of the order of this Court dated April 11, 1966. While, admittedly, notice of the sale was not published fifteen (15) days prior to the date of sale, I do not believe that such failure would render said proceeding void. As noted by counsel for defendant Dodd, the purpose of the notice provision, as stated in the statute, is to "encourage attendance at the sale." Aside from the curative provisions of Code, 11A-4-33, I do not believe that such failure on the part of the Deputy Commissioner was shown to have prejudiced the rights of the plaintiff in this case. Consequently, I do not believe such failure affected the validity of the title conveyed in this case.

Plaintiff also contends that the property in question was so incorrectly described in the Deputy Commissioner's complaint as to render the proceedings against the subject property void. In this regard, it is argued that the Deputy Commissioner's complaint should have referred to Cecle G. Pearson's source of title instead of H. C. Pearson, Jr.'s source of title. In my opinion, the reference to the former owner's source of title did not affect the validity of the tax sale. Plaintiff made payments on the taxes assessed in the name of H. C. Pearson, Jr., and there is nothing in this record to show that she was in fact misled by such description. I, therefore, find no merit in this regard.

I again note that I have not attempted herein to respond to every assertion regarding the regularity and/or validity of the proceedings for the sale of the mineral interest in question. I have nevertheless carefully considered all of said contentions, and am of opinion that all of said irregularities and/or "failures" come within the meaning of *Code, 11A-4-33,* which provides in part as follows:

> "Except as otherwise provided in this section, no irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title thereby acquired."

Accordingly, said irregularities or "failures" do not, in my opinion, constitute sufficient reason for declaring this particular sale void.

Notwithstanding the aforementioned curative effects of Code, 11A-4-12, plaintiff contends that said section is invalid because the object of that section is not expressed in the title to the Act, as required by the West Virginia Constitution, Article IV, § 30, which provides as follows:

> "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act. And no act of the legislature, except such as may be passed at the first session under this Constitution, shall take effect until the expiration of ninety days after its passage, unless the legislature shall by a vote of two-thirds of the members elected to each house, taken by yeas and nays, otherwise direct."

Counsel for the plaintiff acknowledges a discussion of this question in the opinion in *State v. Blevins,* 131 W. Va. 350, at pages 355 and 356, as follows:

> "The questions raised by the demurrer are grounded entirely on the statute, the title of which reads as follows: 'AN ACT to amend and reenact section eight, article three, and all of article four, chapter *eleven-a* of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the collection and enforcement of property taxes, including the redemption of forfeited and delinquent lands and the sale of forfeited, delinquent, escheated and waste and unappropriated lands for the benefit of the school fund.' (Italics ours). It will be noted that the above quoted title refers to Chapter 11A of the Code of 1931. An ex-

amination of the official Code of 1931, discloses that no chapter therein contained is designated as 11A. But Chapter 117, Acts of the Legislature, 1941, added a new chapter to the Code of 1931 to be numbered '11-A'. The provisions of Chapter 117, *idem,* eliminate the apparent inaccuracy in the title of the statute here considered, and we consider that the title sufficiently identifies the applicable statutes amended and reenacted thereby."

Counsel points out, however, and correctly so, that the quoted discussion was not "supported" in the syllabus. Nevertheless, in my opinion, said discussion correctly indicates the constitutionality of said Act. In a recent case on this general subject—City of Huntington v. Chesapeake & Potomac Telephone Company (W. Va., 1970), 177 S. E. 2d 591—the Court collates a number of pertainent syllabi from former decisions, as follows:

"* * * * * *.

"3. The 'object' of an act of the legislature, as that word is used in section 30, Article VI, Constitution, means the matter or thing forming the groundwork of the act. The act therefore may contain many parts germane to the title, but they must be such that when traced back will lead the mind to the object expressed in the title as their generic head.' Point 1 Syllabus, Moats v. Cook, 113 W. Va. 151 [167 S. E. 137].

"4. 'When the principal object of an act of the legislature is expressed in the title, and the act embraces, along with such principal object other incidental or auxiliary objects germane to the principal object, the act is not repugnant to section 30, art. 6, of the constitution, and is valid as to such principal and auxiliary or incidental object.' Point 10 Syllabus, State v. Mines, 38 W. Va. 125 [18 S. E. 570].

"5. 'If the title of an act is broad enough to give a fair and reasonable index to all the purposes of the act, it is not necessary to descend to particulars in the

title.' Point 1 Syllabus, State ex rel. Hallanan v. Thompson, 80 W. Va. 698 [93 S. E. 810].

"* * * * * * * *"

The decision in *State ex rel. Myers v. Wood* (W. Va., 1970), 175 S. E. 2nd 637, cited by counsel for the plaintiff, is not, in my opinion, in point or even persuasive in considering the instant case inasmuch as the decision in the *Myers* case involved a criminal offense embodied in an act which, by its title, purported to relate only to the administration and financial affairs of the State and to the Department of Finance and Administration. I, therefore, am of opinion that there is no merit in the contention that Code, 11A-4-12 is invalid for failure to state the object of the act in the title.

The due process objection in this case involves the sufficiency of notice of the sale to the plaintiff. It is argued that the inclusion of the plaintiff as an "unknown party" does not constitutionally satisfy the notice requirement. I have carefully considered all the arguments in support of this contention, as well as the authorities cited. While plaintiff's argument is persuasive, I am, nevertheless, of opinion that my decision is controlled by the second syllabus in the case of *State v. Simmons,* 135 W. Va. 196, as follows:

"In a suit to sell forfeited and delinquent lands for the benefit of the school fund, instituted under the provisions of Chapter 160, Acts of the Legislature, 1947, Regular Session, persons holding record liens against, having or claiming an interest in, or in possession of, such lands, whether residents or nonresidents of this State, may be proceeded against as unknown defendants by an order of publication; and such procedure is not violative of the due process or other provisions of the Constitution of the United States or of the Constitution of West Virginia."

As an alternative proposition, plaintiff contends that she is entitled to one-eighth of all the oil and gas produced, citing Code, 11-4-9, which, as noted above, provides that only the interest or undivided interest proceeded against

shall pass to the purchaser. In my opinion, however, for the reasons stated above, said provision is not applicable to the case at bar wherein the interest proceeded against was a one-fourth interest, despite the fact that it was erroneously designated as one-eighth. The applicable provision, in my opinion—Code, 11A-4-33—provides that the purchaser from the Deputy Commissioner " * * * shall thereby acquire all such right, title and interest in and to the real estate as was, at the time of the execution and delivery of the deed, vested in or held by the State or by any person who was entitled to redeem * * *."

I have also carefully considered the plaintiff's argument pertaining to "unjust enrichment". I do not believe, however, that the evidence stipulated in this case warrants any relief on this ground. The stipulation reveals that the Commissioner's deed conveying the real estate to defendant Dodd was dated June 1, 1966; that the lease agreement referred to in paragraph "M" of the stipulation was ratified by defendant Dodd and his wife on February 17, 1967; that various other agreements concerning the mineral interest were entered into prior to March 20, 1968, the commencement date for the well; that the drilling thereof was completed on March 26, 1968; and that this action was not instituted until July 9, 1971. Under these circumstances, I fail to see the plaintiff's equity in this regard.

Upon all of the foregoing, I am of opinion and find that the plaintiff, Cecle G. Pearson, owns no part of the oil and gas interest asserted in the complaint filed in this action, and that the tax deed described in the complaint filed in this action, and the other instruments based thereon, should not be set aside as a cloud upon the title of the plaintiff in and to said oil and gas interest. Accordingly, the special defenses asserted by the defendants in this case are moot, and need not be decided by me. I would note, however, that the defense of *res judicata,* since it would precede consideration of the plaintiff's contentions, did not, in my opinion, preclude consideration of the plaintiff's contentions in this case, in view of the fact that such issues were apparently not before me in the former proceeding.

A proper order in conformity herewith should be tendered for entry promptly, and should make this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

s/Frank L. Taylor
Frank L. Taylor, Judge

WEST VIRGINIA STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

§ 11A—4—12. Service of process by publication; failure to name person as defendant; failure to obtain personal service in prior suits.

Upon the institution of a suit as provided in section ten [§ 11A-4-10] of this article, the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A.B. et al.; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.

The order shall be published as a Class III-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1- et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The cost of such publication shall be charged ratably to each item listed in the suit, and shall be taxed to the State as part of its costs in the suit and paid as hereinafter provided.

In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under

the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit. (1947, c. 160; 1949, c. 134; 1967, c. 105.)

§ 11A—3—8. Redemption from purchase by or forfeiture to State; lands made irredeemable.

The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution.

The former owner of any real estate forfeited to the State for nonentry, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time prior to its certification by the auditor for sale for the benefit of the school fund as provided in article four [§ 11A-4-1 et seq.] of this chapter, but such redemption shall be subject to any prior transfer under the provisions of section 3, article XIII of the Constitution.

In order to redeem the person seeking redemption must pay to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges for which the real estate was sold, with interest at the rate of twelve percent per annum from the date of sale. (2) All taxes assessed thereon for the year in which the sale occurred, with interest at the rate of twelve percent per annum from the date on which they became delinquent, except when such taxes are currently due and payable to the sheriff. (3) All taxes except those for the current year which would have been assessed thereon since the sale had the sale not occurred, or which, in the case of land forfeited for nonentry, would have been assessed thereon had the land been properly entered, with interest at the rate of twelve percent per annum from the date on which they would have become delinquent. (4) The fee provided by the following section [§ 11A-3-9] for the issuance by the auditor of the certificate of redemption.

In computing the amount due under number three on real estate purchased by the State, the auditor shall use as the basis for computation the classification and valuation placed thereon by the assessor for each year since the sale. If such valuation and classification have not been made, he shall use the last valuation and classification appearing on the property books. In computing the amount due under number three on real estate forfeited for nonentry, the auditor shall use as the basis for computation such classification and valuation as may, at the request of the auditor or the person redeeming, be certified to the auditor by the assessor as the classification and valuation which in his opinion would be proper for each year of nonentry.

In the case of partial redemption, he must pay only the proportion of such taxes as are chargeable to the part or interest redeemed, but must pay all of the other charges and the fee required for redemption of the whole. However, redemption of an undivided interest included in a group assessment or of part of a tract or lot the whole of which was assessed in the name of a person other than the owner shall not be permitted until the applicable provisions of section nine [§ 11A-1-9] or of section ten [§ 11A-1-10], article one of this chapter, have been complied with, except that instead of presenting the assessor's certificate to the sheriff as therein required, the person redeeming shall present it to the auditor, who, after making the necessary changes in the land book, and in the record of delinquent lands kept in his office, shall compute the taxes due on the part of interest redeemed.

Art. 13, § 4. Waste and Unappropriated Lands

§ 4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or excheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of,

the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

UNITED STATES CONSTITUTION AMENDMENT 14

ARTICLE XIV_

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

NO. 13257

CECLE G. PEARSON,
Appellant,

v.

(Circuit Court of Kanawha County CA No. 8310)

W. P. DODD, et al.,
and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecle G. Pearson, the Appellant named above, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia, entered in this proceeding on December 18, 1975, which affirmed the final order of the Circuit Court of Kanawha County, West Virginia, entered on June 21, 1972, which overruled Appellant's motion for a new trial, thus holding that the Appellant did not own any part of the oil and gas interest contended for in her action to quiet title against the Appellees.

This appeal is taken pursuant to 28 U.S.C. §1257(2), or, in the alternative, §1257(3).

This Notice supersedes Notice dated February 5, 1976.

Dated: February 26, 1976.

Philip G. Terrie
Attorney at Law
1009 Security Building
Charleston, West Virginia 25301

s/Philip G. Terrie
Counsel for Cecle G. Pearson,
Appellant

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 26th day of February, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by delivering the same to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon Columbia Gas Transmission Corporation, Appellee herein, by delivering the same to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at 1700 MacCorkle Avenue, S. E., Charleston, West Virginia 25304.

s/Philip G. Terrie

Subscribed and sworn to before me, Mary C. Matheny, at Charleston, West Virginia, this 26th day of February, 1976.

s/Mary C. Matheny
Notary Public in and for Kanawha
County, West Virginia

My commission expires September 24, 1978.